In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 508

ALBO TRADING CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The findings, conclusion and opinion of the Court of Claims (R. 11-18) are not yet reported.

JURISDICTION

The judgment of the Court of Claims (R. 18) was entered on June 5, 1951. A motion for a new trial was denied on October 2, 1951 (R. 18). The petition for a writ of certiorari was filed on December 31, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly determined that just compensation for petitioner's mutilated Marlin machine guns and parts, requisitioned by the War Production Board pursuant to the provisions of the Act of October 16, 1941, 55 Stat. 742, as amended, was measured by their scrap value.

STATUTE INVOLVED

The pertinent portion of the Act of October 16, 1941 (55 Stat. 742), as amended by the Second War Powers Act (56 Stat. 181) is as follows:

> That whenever the President, during the national emergency declared by the President on May 27, 1941 * * * determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, * * *. The Presi-

dent shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims * * * in the manner provided by sections 24(20) and 145 of the Judicial Code * * * for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

STATEMENT

On November 16, 1942, the War Production Board, acting through Metals Reserve Company, and pursuant to the provisions of the Act of October 16, 1941, 55 Stat. 742, as amended (*supra*, p. 2), requisitioned and took possession of 1492 mutilated Marlin machine guns and 37 cases containing machine gun parts belonging to petitioner (R. 14). On or about March 16, 1943, petitioner filed a proof of claim with the War Production Board, in which it claimed $50.00 each for

1500 mutilated Marlin guns and $5,000 for the 37 cases containing spare parts (R. 14-15). On August 10, 1943, the War Production Board determined that the value of the requisitioned property was represented by its scrap value which totaled $282.78 and on September 29, 1943, made an award of compensation to petitioner in that amount (R. 15). On October 4, 1943, the Metals Reserve Company tendered this sum to petitioner and, when it was rejected, tendered it 50 per cent of the award on November 18, 1943 (R. 15). Petitioner refused to accept any payment of the award (R. 15), and on January 19, 1948, instituted this suit in the Court of Claims alleging that the fair and reasonable value of the property taken was $80,000 (R. 1-3). The Court of Claims concluded that the fair value of materials requisitioned from petitioner was measured by their scrap value and affirmed the award by the War Production Board to petitioner of $282.78, based on the following findings:

The Marlin machine gun had been the standard United States Army weapon during World War I, although before the end of that war it was being replaced by the Browning machine gun. About 1922 the United States Army determined that the Marlin gun was obsolete in the sense that it no longer was suitable for the purpose for which it was originally intended since it had been superseded by the modern Browning gun. The Army

had, in accordance with the standard procedure in such cases, disposed of its holdings of such guns, spare parts, etc., and ceased maintaining facilities for the production of the gun or parts (R. 15).

Petitioner's president, on August 14, 1933, purchased from the Schenectady Depot of the United States Army, at Schenectady, New York, a lot of surplus Army material described as "Lot #3 of scrap steel" and which included 3334 mutilated Marlin machine guns,[1] as well as 500 mutilated Hotchkiss machine guns, 2173 Hotchkiss machine gun tripods, 963 mutilated Krag rifles, 500,000 cores for bullets and miscellaneous machine gun parts (R. 11). The entire lot of material was purchased for slightly less than $2,000.00 (R. 12).

Subsequently, petitioner purchased a large quantity of miscellaneous scrap iron and brass, which included an unspecified quantity of machine gun parts, some of which remained on hand on November 16, 1942 (R. 12). Between 1933 and 1936, petitioner sold as souvenirs a few hundred of the mutilated Marlin guns and about 500 Vickers machine guns acquired on a different purchase, at prices ranging from $7.75 to $9.75 each. Such sales were discontinued in 1936, when

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[1] These guns were mutilated in the sense that, prior to offering them for sale, each of these guns was burned with an acetylene torch in the chamber of the barrel and in the receiver at about the spot where the barrel and receiver met. The spot chosen was the weakest point in the receiver, being the point where the receiver was held together by the smallest amount of steel (R. 12).

petitioner learned that it was possible to repair the guns so that they could be reused and souvenir sales were not again conducted, except for a short period of time in 1940 (R. 12).

In December 1940, plaintiff sold its entire stock of mutilated Hotchkiss machine guns to Van Karner Ordnance Corporation, amounting to 499 units, at $50.00 each. Between July and December 1941, plaintiff sold its entire remaining stock of mutilated Vickers machine guns to Ben Sagor at $50.00 each. In October 1940, plaintiff sold 26 of the mutilated Marlin guns to Sedgly Company at $45.00 each; in January 1941, it sold the same concern 47 of these guns at the same price, and in January 1942, it again sold it 15 of such guns at the same price (R. 12-13).

On June 13, 1941, one Aubrey W. Lyon entered into an agreement with Van Karner Ordnance Corporation [2] whereby 50 mutilated Marlin machine

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[2] Van Karner Chemical Arms Corporation, which had been the principal purchaser of mutilated machine guns from plaintiff, had undertaken to repair and rebuild such guns. This was done by replacing the burned barrel with another barrel, and by repairing the burn in the receiver by welding it (R. 15). The repairs and replacements and improvements made by Van Karner resulted in a gun which satisfactorily stood a series of tests to which it was subjected at the suggestion of the Navy Department and of the Russian Government and on Van Karner's own initiative. It, however, did not pass all of the tests which would have been required by the United States Army as a prerequisite to its purchase; in fact, the United States Army regards a gun with a welded receiver as not dependable and will not accept such a gun (R. 15-16).

guns owned by plaintiff were sold to Van Karner at $50.00 each, and Van Karner was given an option to purchase 50 additional guns of the same type every 15 days thereafter at the same price. On or about June 23, 1942, this agreement was terminated, and an agreement entered into between plaintiff and Van Karner Chemical Arms Corporation, successor to Van Karner Ordnance Corporation, whereby 100 mutilated Marlin machine guns were sold to Van Karner at a price of $50.00 each, and Van Karner was given the option to purchase 50 additional guns each month thereafter at the same price (R. 13).

The two Van Karner corporations exercised these options regularly through October 15, 1942, and 1,350 Marlin guns were delivered to them through that period of time. Van Karner Chemical Arms Corporation failed to make the payment required under the option at the stipulated date in November 1942, but was granted a 15-day extension of time by plaintiff on its representation that it was negotiating with the Navy for a contract which would permit it to purchase the entire remaining quantity immediately. This time extension had not expired on November 16, 1942[3] (R. 13).

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[3] As pointed out *infra*, p. 8, the negotiations had been broken off by the Navy Department because of the ability of the Army to supply the Navy with the more modern Browning machine gun.

The principal market for machine guns is for use in the armed services of nations, but they are also used to a limited extent by police departments. The United States Army was not in the market for the purchase of any of these guns, since they had been superseded by the Browning gun. During 1940 and until sometime in October of 1942, there was some market for these guns for use by foreign governments and by State Guards. During this period there had been sales of small quantities of these reconditioned Marlin guns at prices ranging from $150.00 to $300.00 a gun. As late as October 15, 1942, the United States Navy was negotiating with Van Karner Chemical Arms Corporation for the purchase of 2,500 of these guns at $266.00 a gun, but these negotiations were suspended on this date because of the ability of the Army to supply the Navy with the more modern Browning gun, which was superior to these guns in dependability of operation, freedom from jamming, and other characteristics. By October 1942, manufacturers of these Browning guns were more than able to supply the demand for machine guns by all the armed forces of the United States and of its allies. By that date they had so far satisfied all demands for machine guns that they reduced their output from 20,000 per month to 16,000 per month. This output was only about 50 per cent of their capacity (R. 16).

While prior to November 16, 1942, some sales had

been made of these reconditioned Marlin guns, the market for them had practically disappeared by October 1942. In the early part of 1943, the Navy Department offered a quantity of Lewis and Marlin machine guns, which had not been mutilated but were in their original condition, to any of the armed forces of our allies who might desire to acquire them, but no nation made any offer for them and the Navy Department disposed of them as scrap (R. 16).

The Court of Claims concluded that since there was practically no market for these guns after October 1942, there was thereafter practically no market for their spare parts and accessories and that the fair value of the materials requisitioned from petitioner on November 16, 1942, was their scrap value of $282.78.

ARGUMENT

The concept which this Court has most often adopted to measure just compensation is, as petitioner urges, the market value of the property requisitioned (Pet. p. 16). *United States* v. *Miller*, 317 U.S. 369, 374; *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402. Where, however, the peculiar circumstances make it impossible to determine a market value, "an owner's indemnity should be measured in various ways depending upon the circumstances of each case" and "no general formula should be used for the purpose." *United States* v.

Miller, supra, at pp. 373-374. As this Court cautioned in *United States* v. *Toronto Nav. Co., supra,* at 402: "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules."

In the instant case, the Court of Claims found that the Marlin machine guns had been determined to be obsolete by the United States Army as early as 1922 and had been superseded by the modern Browning gun (R. 15); that what market had remained for the obsolete Marlin guns had existed prior to October 1942 and had practically disappeared by that date (R. 16); and that by October 1942 manufacturers of the Browning machine gun were more than able to supply the demand for machine guns by all the armed forces of the United States and its allies (R. 16). The conclusion is inescapable that what market had existed for the obsolete Marlin guns had remained in existence only because the early wartime situation created a heavy demand for machine guns of any type and that when the manufacturers of the modern Browning gun caught up with this demand in October 1942, this limited market virtually disappeared. Not only had the market for the rebuilt Marlin gun disappeared by October 1942, but, by the early part of 1943, the Navy Department did not receive any acceptance of an offer to the armed forces of our allies of a quantity of Marlin machine guns which had not been mutilated but were in

their original condition, and the Navy was forced to dispose of them as scrap [4] (R. 16-17).

Moreover, aside from the evidence which clearly establishes that the requisitioned material had only scrap value, the conclusion of the court below is supported by the decisions of that court in *Van Karner Chemical Arms Corporation* v. *United States,* 109 C. Cls. 425, and *International Aircraft Trading Co.* v. *United States,* 109 C. Cls. 435.

Those cases involved the determination of just compensation for obsolete machine guns and parts of the same types as are here involved which had been requisitioned by the United States on the same date as the requisition involved in the present case.[5] In the *Van Karner* case, the requisitioned material included completely rebuilt guns as well as mutilated guns, parts and accessories. In deciding that case, the Court said (109 C. Cls. at 433-434):

> * * * Had defendant not requisitioned the guns, we have serious doubt that plaintiff could have disposed of them at all, at least not until the next war.
>
> * * * * *
>
> The [mutilated guns] on which practically no rebuilding had been done, we think, were worthless, except for their scrap value. The

[4] The failure of Van Karner to exercise its option to purchase Marlins in November 1942 (R. 13) is another example of the drying up of the demand for Marlins.

[5] The record in these two cases was stipulated to be part of the record in the present case (Tr. 311-312, 344-346).

> cost of rebuilding them largely exceeded what plaintiff could have realized for them. We have, therefore, allowed plaintiff for these guns and for the parts and accessories, except the ammunition, only the scrap value. * * *[6]

In the *International Aircraft* case, the requisitioned material consisted entirely of rebuilt guns plus some spare parts. The Court allowed $13.00 for each rebuilt gun, but only scrap value for the spare parts.

Thus, for a taking of identical materials upon the same date, the court below has held that scrap prices measure the just compensation to which an owner is entitled.

We respectfully submit that the evidence clearly discloses that the conclusion of the court below (R. 17) and of the commissioner (R. 11) that the fair value of the materials requisitioned from petitioner on November 16, 1942, was represented by its scrap value was clearly correct.

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[6] The Court further specifically found (Finding 15, 109 C. Cls. 430-431):

> * * * During 1940 and until sometime in October of 1942 there was some market for these guns for use by foreign Governments and by State Guards * * *
>
> While prior to this date [October 1942] some sales had been made of these reconditioned Marlin guns, the market for them had practically disappeared by October 1942. * * *

It should be recalled that the Van Karner Corporation had been the principal purchaser of the mutilated Marlin guns from petitioner (R. 13).

CONCLUSION

There is no conflict of decisions and further review is not warranted. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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